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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JOSEPH G., a Person Coming Under  
the Juvenile Court Law.

B156843

(Super. Ct. No. VJ25446)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court for the County of Los Angeles,  
Jaime R. Corral, Judge. Affirmed.

Kimberly Jackson Lee, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Brad D. Levenson  
and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Following his arrest for shoplifting, Joseph G., then 17 years old, was charged in a petition filed in juvenile court with burglary and petty theft (Welf. & Inst. Code, § 602). The petition was sustained. Joseph was declared a ward of the court and placed at home on probation. He appeals, contending the court violated his constitutional right to present a defense by refusing to permit his counsel to use a surveillance videotape to impeach the prosecution's only witness. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On the day of the hearing on the petition, the prosecutor provided Joseph's counsel with a store surveillance videotape. Defense counsel moved to exclude the videotape from evidence because it had not previously been produced in discovery. The prosecutor asserted she had just become aware of the tape and argued there was no discovery violation.<sup>1</sup> The court ruled, "The motion to exclude the tape, or any reference to it, is granted."

The store's loss prevention officer Juan Garcia was the People's only witness. He testified he was watching a store surveillance camera when he saw Joseph taking Tylenol off the store shelf. Garcia ran to the store floor and saw Joseph take more Tylenol off the shelf, hide it in a "utility tub" and walk toward the front of the store, carrying the tub. Joseph then walked out of the store without paying for the items. Garcia stopped him outside the door. Garcia testified Joseph told him "my uncle told me to" take the items. However, Garcia did not see anyone with Joseph at the time he detained him.

On cross-examination, Garcia testified he did not see anyone with Joseph inside or outside the store, either directly or on the surveillance camera, nor did he make any attempt to search for or inquire about the uncle. The following exchange then took place:

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<sup>1</sup> The prosecutor explained: "This morning Juan Garcia, who is the loss prevention officer for K-Mart, came in. As I was interviewing him, he said to me, 'oh, did you want to see the video tape?' I said, 'what video tape?' He handed it to me. I reviewed it with him."

“MR. KEENAN [Joseph’s counsel]: Your Honor, at this time we’d ask to bring in the tape now as impeachment.

“THE COURT: That’s already been excluded.

“MR. KEENAN: Your Honor, it is excluded by the People. It’s something that is admissible as impeachment evidence.

“If the minor has taken the stand and had made contrary statements on that tape, Miss Mattson could have brought that tape in for impeachment.

“THE COURT: Motion denied.

“MR. KEENAN: Over our objection, Your Honor.

“THE COURT: You made a motion, and the motion was denied. And your objection is to the court’s ruling, is that what you’re saying?

“MR. KEENAN: Can the court explain to me why it thinks the tape is inadmissible for impeachment purposes?

“THE COURT: Because it’s already been ruled that the tape is not going to be in evidence at all. They were not going to present it even on rebuttal.

“MR. KEENAN: It’s been ruled that Miss Mattson --

“THE COURT: It’s been ruled that it’s inadmissible.

“MR. KEENAN: For Miss Mattson.

“THE COURT: Inadmissible.

“MR. KEENAN: It has not been ruled inadmissible by defense.

“THE COURT: It’s ruled inadmissible for anyone.

“MR. KEENAN: Your Honor, it’s the defense’s position that this tape will show --

“THE COURT: The record is made, Mr. Keenan. Continue.

“MR. KEENAN: Your Honor, I’m trying to make my record.

“THE COURT: You’ve made your record.

“MR. KEENAN: I don’t believe I made a sufficient record, Your Honor.

“THE COURT: Mr. Keenan, continue to something else. I’ve ruled. It’s a sufficient record.

“MR. KEENAN: Again, just for the record, I think the court --

“THE COURT: Everything we’ve been talking about is on the record.

“MR. KEENAN: The court is not permitting the defense to make a proper record.

“THE COURT: I have. You’ve made it. You’re protected.

“MR. KEENAN: No further questions of this witness.”

Joseph testified that he went to the store at the request of his mother’s cousin Mark Valarde, whom he referred to as his “uncle.” Joseph claimed Valarde told him to get the Tylenol and, when Joseph handed him the Tylenol, placed it in a utility tub in a shopping cart. Joseph testified the two then separated within the store. When they reunited, Valarde told him they were ready to leave and the items had been paid for. Therefore, Joseph testified, when he took the tub and its contents out of the cart and out of the store, he believed they had been paid for.

At the conclusion of the jurisdiction hearing, the court sustained the petition and placed Joseph at home on probation for three years. This appeal followed.

## **DISCUSSION**

### *1. Joseph Has Waived His Federal Constitutional Claims*

Joseph argues the juvenile court’s ruling precluding his use of the videotape to impeach Garcia violated his constitutional right to present a defense and to confront adverse witnesses. The People contend Joseph has waived this claim because he did not make ““a specific and timely objection in the trial court on the ground sought to be urged on appeal.”” (See *People v. Waidla* (2000) 22 Cal.4th 690, 717.) In the juvenile court Joseph did not raise his constitutional right to present a defense or confront witnesses under the Sixth and Fourteenth Amendments to the United States Constitution. Accordingly, his federal constitutional claims are waived. (*People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7.) However, Joseph did adequately preserve his state law claim that the juvenile court abused its discretion in excluding the videotape for all purposes.

## *2. The Juvenile Court Erred in Excluding Use of the Videotape for Impeachment*

Joseph contends the juvenile court erred in refusing to permit him to use the videotape to impeach Garcia's testimony and again in not allowing his counsel to make an appropriate offer of proof. We agree.

The prosecutor never objected to the use of the videotape for impeachment purposes, and the People have not suggested any legal ground that required its exclusion. Instead, they argue that, *if* the People had objected to use of the videotape for impeachment under Evidence Code section 352, the juvenile court *would have been* within its discretion to sustain that objection. The juvenile court plainly did not invoke Evidence Code section 352 on its own motion and did not balance the probative value of the videotape against the undue consumption of time its admission would have caused. Evidence Code section 352 does not save the court's erroneous ruling.

## *3. Joseph Has Failed to Establish Prejudice*

Under California law a judgment may not be reversed based on evidentiary error unless the error is prejudicial -- that is, unless it is reasonably probable admission of the improperly excluded evidence would have produced an outcome more favorable to the defendant. (Cal.Const., Art. IV, § 4-1/2; Evid. Code, § 354; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Prejudice is not presumed, but must be affirmatively demonstrated. (*Watson*, at p. 835.)

Joseph has not established prejudicial error. Although he asserts "the prosecution's main witness had testified that he had not seen anyone with appellant, and appellant sought to impeach that testimony with the videotape," the record fails to indicate what was on the videotape and whether it would have impeached Garcia or supported his testimony. We recognize that the juvenile court improperly refused to permit Joseph's counsel to make an offer of proof, and we do not suggest his consequent inability to do so in the juvenile court constituted a waiver. However, the videotape was not made part of the record on appeal; and Joseph's appellate brief provides only indirect and speculative information about its contents. Despite the trial court's improper refusal

to hear his offer of proof, it was incumbent on Joseph to provide us with an adequate record on appeal rather than inviting us to speculate as to the contents of the videotape and the effect of its exclusion. Because we can only guess as to the contents of the videotape, we have no basis upon which to form an opinion that Joseph would have obtained a better result if he had been allowed to use it in cross-examining Garcia. (See *People v. Watson, supra*, 46 Cal.2d at pp. 836-837.)

**DISPOSITION**

The orders of the juvenile court are affirmed.

PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.